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IN THE

Supreme Court of the United States

October Term, 1969
No. 1122

MARSHALL BLOOMSMAN and S. JEROME TAMKIN, Ph.D., individually, and on behalf of all others similarly situated,

Appellants,

vs.

AUTOMOBILE MANUFACTURERS ASSOCIATION, INC., GENERAL MOTORS CORPORATION, FORD MOTOR COMPANY, CHRYSLER CORPORATION, AMERICAN MOTORS CORPORATION, and UNITED STATES OF AMERICA,

Appellees.

On Appeal From the United States District Court for the Central District of California.

JURISDICTIONAL STATEMENT.

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JURISDICTIONAL STATEMENT

substantial legal questions affecting the health and well being of the American public are presented.

Opinion Below.

The judgment of the District Court for the Central District of California is reported in C.C.H. Trade Cases Para. 72,907 (1969). The Court's Memorandum Opinion is unreported. Copies of the judgment and opinion are attached hereto as Appendices A and B respectively.

Jurisdiction.

The United States' action was brought to obtain a declaration that defendants-appellees were in violation of Section 1 of the Sherman Act (15 U.S.C. Section 1), to enjoin them from pursuing various actions in violation thereof, and for general relief. On September 17, 1960, appellants filed a national class action on behalf of the American public under Rule 23 of the Federal Rules of Civil Procedure against the same defendants-appellees pursuant to Section 4 of the Clayton Act (15 U.S.C. Section 15), alleging in material part a violation of Section 1 of the Sherman Act, and seeking injunctive, treble damage, and general relief. Similar actions have been filed by numerous states, local governments and private citizens. They are now docketed (#31) before the Judicial Panel on Multidistrict Litigation of the United States Courts.

Appellants moved the District Court to disapprove the proposed Consent Judgment and to allow consolidation of the two actions under Rule 42(a) of the Federal Rules of Civil Procedure. On October 29, 1969, the District Court entered an order approving the Stipulation for Entry of Consent Judgment, entered judg-

ment thereon, and denied appellants' motion to consolidate. Notice of appeal to this Court was filed in the District Court on December 15, 1969. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 15 U.S.C. Section 29, commonly known as the "Expediting Act". The following decisions sustain this direct appeal to the Supreme Court: *Utah P. S. Com. v. El Paso Nat. Gas Co.*, ... U.S. ....., 23 L. Ed. 474 (1969); *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967); *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U.S. 137 (1944); *United States v. California Co-op Canneries*, 279 U.S. 553 (1929); and *Missouri-Kansas Pipe Line Co. v. United States*, 108 F. 2d 614 (3rd Cir. 1939), *cert. denied* 309 U.S. 687 (1940).

Questions Presented.

1. Where a District Court is requested to approve a proposed antitrust consent decree of critical public concern, does the hearing thereon and subsequent final judgment meet the requisites of due process of law if notice of the hearing is ordered given only to a modicum of the persons adversely affected.

2. Where a District Court is requested to approve a proposed antitrust consent decree of critical public concern, does due process require that adversely affected persons be permitted to cross-examine parties and witnesses and to inspect documents material to the subject matter of the proposed consent decree.

3. Where a consent decree is proposed involving highly complex issues of critical public concern, may the Court approve the decree and enter final judgment

thereon without presentation for its consideration of any evidence or facts sufficient to enable the Court to determine if the proposed decree is fair, equitable and in the public interest.

4. Where the enforcement policy underlying the provisions of Section 4 of the Clayton Act would be significantly frustrated by entry of judgment upon a proposed consent decree, should entry of judgment be conditioned upon the inclusion of a provision in the decree providing for a limited admission by the defendants of the allegations in the government complaint, for the sole purpose of giving such judgment the *prima facie* effect in subsequent private actions provided in Section 5(a) of the Clayton Act (15 U.S.C. Section 16(a)).

5. Where two suits are pending before the District Court involving identical and complex issues of significant public importance, and where separate trials of these issues would create unnecessary duplicity of time and expense, does a District Court abuse its discretionary powers in denying a motion to consolidate them under Rule 42(a) of the Federal Rules of Civil Procedure.

Statutes Involved.

15 U.S.C. Sections 1, 15, 16(a). The full text of these statutes is attached hereto as Appendix C.

Statement of the Case.

In mid-1966, a Federal Grand Jury commenced investigation of the practices of the automotive industry regarding possible anti-competitive practices in the failure to develop automotive anti-pollution devices. As a

result of the evidence assembled by the Grand Jury over an eighteen month period, the United States, on January 10, 1969, filed a civil complaint charging that defendants-appellees General Motors Corporation, Ford Motor Company, Chrysler Corporation, American Motors Corporation and Automobile Manufacturers Association had violated Section 1 of the Sherman Act by conspiring to eliminate competition in the research, development, manufacture and installation of automotive air pollution control equipment, and in the purchase of patents and patent rights covering such equipment.

Automobiles are shipped to each of the fifty states of the United States. In 1966, for example, 78,315,000 passenger cars and 15,864,000 trucks and buses, exclusive of off-the-road vehicles, were registered in the United States. In that year, 8,604,712 passenger cars valued at more than $17½ billion and 1,791,587 commercial vehicles valued at more than $3.9 billion were produced in this country. These figures have each increased in each succeeding year.

Since at least 1952 it has been established that motor vehicles contribute to air pollution by the emission of hydrocarbons, carbon monoxide, oxides of nitrogen and other contaminants. For example, in Los Angeles County, as of January 1967, gasoline-powered motor vehicles accounted for 12,465 tons out of a total of 14,610 tons, or 85.3% of contaminants emitted into the ambient air daily.[1] A large and growing market for the production and installation of air pollution con-

[1]65 million tons of deadly carbon monoxide are discharged each year by automobiles in this country. PROGRESS IN THE PREVENTION AND CONTROL OF AIR POLLUTION, FIRST REPORT OF THE SECRETARY OF HEALTH, EDUCATION AND WELFARE TO THE UNITED STATES CONGRESS, June 28, 1968, at 16.

trol devices has developed. Such devices are shipped in interstate commerce either as engine or system modifications or as equipment attached to automobiles.

Beginning at least as early as 1953, and continuing to the date of the filing of the United States' action, the defendants-appellees and co-conspirators were engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in motor vehicle air pollution control equipment. The combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, namely:

(a) To eliminate all competition among themselves in the research, development, manufacture and installation of motor vehicle air pollution control equipment; and.

(b) To eliminate competition in the purchase of patents and patent rights from other parties covering motor vehicle air pollution control equipment.

In furtherance of that conspiracy, defendants-appellees did the following:

(a) Agreed that all industry efforts directed at the research, development, manufacture and installation of motor vehicle air pollution control equipment should be undertaken on a non-competitive basis;

(b) Agreed to seek joint appraisal of patents and patent rights submitted to any of them by persons not parties to a cross-licensing agreement entered into on July 1, 1955, and amended and renewed periodically, and to require "most-favored-purchaser" treatment of all parties to the cross-licensing agreements if any one were licensed by persons not a party to that agreement;

(c) Agreed to install motor vehicle air pollution control equipment only upon a uniform date determined by agreement, and subsequently agreed on at least three separate occasions to attempt to delay the installation of motor vehicle air pollution control equipment:

(1) In 1961 defendants-appellees agreed among themselves to delay installation of "positive crankcase ventilation" on vehicles for sale outside of California until the model year 1963, despite the fact that this anti-pollution device could have been installed nationally for the model year 1962 and that at least some automobile manufacturers expressed willingness to do so, in the absence of a contrary industry-wide agreement;

(2) In late 1962 and extending into 1963, defendants-appellees agreed among themselves to delay installation of an improvement to the positive crankcase ventilation device, an improvement which the California Motor Vehicle Pollution Control Board had indicated it would make mandatory;

(3) In early 1964 defendants-appellees agreed among themselves to attempt to delay the introduction of new exhaust pollution control measures on motor vehicles sold in California until the model year 1967; despite the fact that all were capable of installing the improvement for the model year 1966, the defendants agreed to tell California regulatory officials that installation of exhaust anti-pollution measures would be technologically impossible before 1967, and only under regulatory pressure made possible by competing device manufacturers not in the automobile industry did the defendants agree to a California regulatory requirement that exhaust devices be installed for the model year 1966; and

(d) Agreed to restrict publicity relating to research and development efforts concerning the motor vehicle air pollution problem.

The aforesaid combination and conspiracy has had, among others, the following effects:

(a) Hindering and delaying the research, development, and manufacture—both by the defendants and co-conspirators and by others not parties to the agreements—and the installation of motor vehicle air pollution control equipment;

(b) Restricting and suppressing competition among the defendants and co-conspirators in the research, development, manufacture and installation of motor vehicle air pollution control equipment.

The foregoing facts are alleged in the United States' complaint.

The closed door and nefarious conduct complained of was characterized by counsel for the defendants-appellees at the evidence—and fact-free hearing for approval of the proposed consent decree as follows:

> "Basically, the conduct evolves around cooperative efforts of the automotive industry as an industry to develop methods and equipments for reducing the level of objectionable emissions from motor vehicles in response to the urging of the California officials to reduce the impact of motor vehicle emission on smog.
>
> "This case does not involve, your Honor, any sinister form of combination or conspiracy. On the contrary, what is involved is an open and public forum of industry cooperation known to all regulatory bodies, a fact which we believe the court can take judicial notice of." [Transcript, pp. 27-28.]

Defendants-appellees were never required to plead to the United States' complaint. On September 11, 1969 there was filed in the District Court a proposed final judgment together with a Stipulation that judgment could be entered after 30 days unless the United States withdrew its consent before the expiration of that period. On its own motion, by order dated September 17, 1969, the District Court invited all interested persons to express their views on the proposed consent decree and ordered that a hearing be held on October 28, 1969. However, the District Court ordered copies of this order sent only to the parties to the United States' action, the California Attorney General, the Los Angeles County Counsel, the Los Angeles City Attorney, and the Los Angeles Air Pollution Control District. No other notice of the hearing was ordered given, served or published and the aforesaid notice was not ordered published at all.

On September 17, 1969, appellants Marshall B. Grossman and S. Jerome Tamkin, Ph.D., individually and on behalf of all United States residents, filed a separate complaint against defendants-appellees in the same District Court. This complaint and the complaint filed by the United States alleged like acts and violations on the part of defendants-appellees. To avoid the expense and delay of proceeding separately with these two suits, appellants Grossman, *et al.*, filed a motion for consolidation of these two cases under Rule 42(a) of the Federal Rules of Civil Procedure in October, 1969, together with their objections to entry of the proposed consent judgment.

Others also filed objections of the proposed consent decree and some filed applications to intervene. Only

one comment supporting the decree was filed. In addition, many letters were directed to the Court pleading for disapproval of the decree.

On October 28, 1969, the hearing, as ordered, was held, at which time the Court announced its decision approving the consent decree and denying the motions to intervene and consolidate. At the hearing, neither the United States nor the defendants-appellees introduced or presented any evidence or facts. They called no witnesses. They did not summarize the substantive contentions of the United States or the defendants-appellees. They did not advise the Court what evidence supported their respective positions. Appellants requested and were denied the opportunity of cross-examining the parties and inspecting relevant and material documents.

Judgment was entered on October 29, 1969, together with an order impounding certain of the documents gathered by the Federal Grand Jury in its investigation of the defendants.

Appellants filed a notice of appeal to this Court under the Expediting Act (15 U.S.C. Section 29) on December 15, 1969.

The Questions Are Substantial.

The subject matter of this appeal is perhaps of greater potential effect upon the lives and well being of all persons within this country than any other litigation in this century. We are here concerned with the intentional polluting and poisoning of air. According to the charges of the United States' complaint, the defendants-appellees have combined and conspired in such a manner as to insure the continuing pollution of the atmosphere. The effects upon the American people have

been staggering. The one essential ingredient of life, air, has become impregnated with visible and invisible poisons. Our children are herded into cafeterias and gymnasiums during "smog alerts". Their ability to partake of the pleasures of childhood is stifled. The well get sick and the aged and infirm become ill and die. Travel throughout the country is less enjoyable and less pleasurable as one journeys from smog belt to smog belt. And all the while, unbeknown to but a few Americans, the executives of one of our largest industries were combining and conspiring to perpetuate the evil for their own pecuniary self gain.

Presented with the basic information and facts, the District Court might have felt impelled to reject the proposed consent decree and either require different terms as a condition to approval, such as remedial relief, that the parties proceed to trial. Yet the parties saw fit to present the Court with no evidence, no facts, no contentions. In short, the Court was left in the dark and had before it only the government's complaint, the proposed consent decree, and the arguments of persons who were generally uninformed on the merits.

The defendants-appellees were permitted a settlement consisting of little more than a promise "never to do it again" in light of at least the following facts:

(1) The conspiracy and combination was persisted in for sixteen years;

(2) The conspiracy reflected a callous disregard for the health and well being of human beings;

(3) The conspirators secreted from the public and government agencies information respecting the development of anti-pollution devices and affirmatively misrepresented their claimed inability to proceed in the development of same;

(4) The defendants-appellees rank among the elite of American industry in power, economic strength, and influence; and

(5) The proposed consent decree requires no remedial action.

When a consent decree is proposed in a matter of such great moment, surely due process requires that adequate notice of the hearing be given to those persons directly affected and that those persons be permitted the opportunity to cross-examine parties and witnesses and inspect documents material to the subject matter of the proposed consent decree. Each of these rights was requested. None of them were granted. And neither the Court nor the parties to the action bothered to address themselves to these serious and basic constitutional questions.

By reason of the systematic silence of the appellees and the emptiness of the record, the District Court was stripped of its ability to independently exercise its judicial duty of determining whether the proposed consent decree was fair, equitable and in the public interest.

Given the life and death importance of this litigation, the District Court had a duty to the public not to allow itself to be unduly bound by a simple agreement between the parties. Nevertheless, the Court below was of the opinion that air pollution was

> ". . . simply not a problem which the Courts can deal with, and this action today has nothing to do with correcting smog. As a matter of fact, there is nothing I can do in this case that would have any direct or profound effect upon smog whatsoever." [Transcript, p. 9].

The Notice of Hearing and the Hearing Itself Failed to Meet the Standard of Due Process of Law.

In *Mullane v. Central Hanover B & T Co.*, 339 U.S. 306 (1950), this Court stated that:

> "'The fundamental requisite of due process of law is the opportunity to be heard.' (Citations.) This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appeal or default, to acquiesce or contest." *Id.* at 314.

The appellees did not even request that a hearing be held upon the proposed consent decree. The District Court, however, set a hearing. However, notice of the hearing was given only to the parties in the United States' action, to the California Attorney General, the Los Angeles County Counsel, the Los Angeles City Attorney, and the Los Angeles Air Pollution Control District.

Local and state governments and individuals with rights which would be adversely affected by a consent decree should have received notice under Court supervision. The consent decree effectively strips those suffering damages from the conspiracy of the *prima facie* effect of judgment as provided in Section 5(a) of the Clayton Act (15 U.S.C. Section 16(a)).

The Department of Justice did not even follow its own policy of obtaining the views of all parties affected by the proposed consent judgment:

> "(a) It is hereby established as the policy of the Department of Justice to consent to a proposed judgment in an action to prevent or restrain violations of the antitrust laws *only after or on condi-*

tion that an opportunity is afforded persons (natural or corporate) who may be affected by such judgment and who are not named as parties to the action to state comments, views or relevant allegations prior to the entry of such proposed judgment by the Court." (Emphasis added.), 28 C.F.R. Section 50.1.

Analogy may be made to the mandatory/discretionary notice requirements for class actions brought under Rule 23 of the Federal Rule of Civil Procedure. The Advisory Committee's note to Rule 23 indicates the reason for notice requirements in representative type actions:

> "This mandatory notice pursuant to Subdivision c(2), together with any discretionary notice which the Court may find it advisable to give under Subdivision d(2), is designed to fulfill requirements of due process to which the class action procedure is, of course, subject."

In recent Federal Court decisions, it has been held that even the discretionary notice provisions under F.R.C.P. 23(b) must comport with due process of law. In *Eisen v. Carlisle & Jacquelin*, 391 F. 2d 555 (2nd Cir. 1968), the Court in discussing the discretionary notice requirement held that:

> ". . . notice is required as a matter of due process in all representative actions, and 23(c)(2) merely requires a particularized form of notice in 23(b)(3) actions." *Id.* at 564-565.

and that

> ". . . the procedure adopted must conform to the requirements of due process and fairly insure the

protection of absent parties who are to be bound. *Hansberry v. Lee*, 311 U.S. 32, 42, 61 S.Ct. 115, 85 L.Ed. 22 (1940). Notice as an integral part of due process must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Id.* at 568.

See also: *Cranston v. Freeman*, 290 F. Supp. 785 (N.D. N.Y. 1968) at 787; *Clark v. American Marine Corporation*, 297 F. Supp. 1305 (E.D. La. 1969) at 1306; and *Herbst v. Able*, 47 F.R.D. 1 (S.D.N.Y. 1969) at 22.

Even those who received notice and appeared at the hearing were denied the effective opportunity to be heard. They were stripped of all ability to inform themselves or to assist the Court in informing itself. They were denied the right to cross-examine and inspect documents.

The District Court Erred by Not Requiring a Showing That the Proposed Consent Decree Was Fair, Equitable and in the Public Interest.

No consent decree should be approved unless it is established to the satisfaction of the Court that it is fair, equitable, and in the public interest.

Appellees successfully barred the introduction of *any* evidence at the hearing by arguing that such evidence would remove any consent decree from the proviso to Section 5(a) of the Clayton Act regarding the non-*prima facie* effect of consent decrees entered "before any testimony has been taken. . . ." (Defendants' Opposition to Applications for Leave to Intervene and

Other Petitions and Comments Regarding the Proposed Decree, and Memorandum of Points and Authorities, p. 26). However, as appellants argued below;

> ". . . the only logical way that provision can be read is to read it with reference to testimony on the merits of the cause and certainly not testimony which may be adduced to help make the bench better informed as to whether or not the settlement which is proposed is fair, reasonable and adequate." [Transcript, pp. 146-147].

Appellees argued that because the proposed consent decree allegedly provided for substantially all the relief expressly asked for by the government in its complaint, the decree should be approved. Yet, as pointed out by appellants, the government's complaint also requested "such other, further and different relief as the nature of the case may require and the Court may deem just and proper in the premises." (United States Complaint, p. 10, lines 11-13). [Transcript, p. 149, lines 6-13]. By reason of this prayer the Court, after observing the gravity of the appellees' violations during trial, could have decreed any further equitable relief necessary to adequately meet the magnitude of the violations. For example, the Court could have required the defendants-appellees to recall and equip those cars manufactured during the period of the conspiracy with adequate air pollution control devices at their expense. Nevertheless, the District Court judge was of the opinion that

> "The prayer for such relief as may seem proper is a general catchall clause, as all attorneys know, and it means little if anything." [Transcript, p. 162, lines 6-8].

In *United States v. Ward Baking Co.*, 376 U.S. 327 (1964), the complaint also contained a prayer for general relief. After consent decree negotiations, the defendants submitted a proposed consent decree and the District Court ordered the government to show cause why the proposed judgment should not be entered. The government urged the inclusion of two additional injunctive relief provisions. The District Court was of the opinion that the proposed judgment provided all the relief to which the government would be entitled were a decree entered after trial, and approved the proposed consent decree. In vacating the judgment of the District Court this Court stated:

> ". . . it cannot reasonably be assumed that the government could not, at the trial, have introduced evidence justifying, in whole or in part, the relief sought.[3] This is not to say, of course, that the District Court could not correctly have concluded, *after trial and an 'opportunity to know the record and to appraise the need for prohibitions or affirmative actions.' United States v. United States Gypsum Co., supra*, 340 U.S. at 89, 95 L.Ed. at 101, that the requested relief was not warranted. Under the circumstances of this case, however, it could not so conclude without a trial.
>
> [3]The disputed provisions certainly may be regarded as within the general scope of the relief sought in the complaint, which included a request for 'such further, general, and different relief as the nature of the case may require and the Court may deem appropriate in the premises.' It should be noted in this regard that the companies did accede to a number of government de-

> mands which went beyond the violations charged or the specific relief requested." *Id.* at 332-333 (Emphasis added.)

The *Ward* case makes it clear that a prayer for general relief cannot be ignored in comparing the provisions of a proposed consent decree with those of a complaint in determining the adequacy of relief granted by the consent decree. Moreover, *Ward* is support for appellants' contention that the District Court committed error in not allowing itself, in the words of the Court, "an opportunity to know the record and to appraise the need for prohibitions or affirmative actions".

The District Court had the power to reject the proposed consent decree.

In *United States v. Blue Chip Stamp Company*, 272 F. Supp. 432 (C.D. Calif. 1967), the Court, after a hearing, refused to sign a proposed consent decree. In *United States v. Pan American World Airways, Inc.*, 1959 C.C.H. Trade Cases, Para. 75,138 (S.D.N.Y. 1959), the Court would not approve a proposed consent decree and ordered the parties to trial. In *United States v. F. & M. Schaeffer Brewing Company and Anheiser Busch, Inc.*, 1968 C.C.H. Trade Cases, Para. 72,345 (C.D.N.Y. 1967), the Court recognized the judicial function of the Court when a consent decree had been offered and new parties objected to it, and then set the matter for a hearing:

> "[A]s a judicial act, the consent decree constitutes the determination by the Court that its content is equitable and in the public interest. * * * Report

of the Antitrust Subcommittee (Sub. Comm. No. 5) of the Committee on the Judiciary, H.R. 27, 86th Cong., 1st Sess., Consent Decree Program of the Department of Justice, January 30, 1959 at p. 3." *Id.* at p. 84,940.

In *United States v. First National Bank and Trust Company of Lexington, Kentucky,* 280 F. Supp. 260 (E.D. Ky. 1967), Chief Judge Swinford when faced with an analogous situation in an antitrust case of essentially local concern, stated:

> "I do not question the right of the United States or any other public agency to compromise litigation in which it is involved, but I do believe that the United States should go very slowly in cases of this character where the whole community, comparatively small though it may be, is deeply concerned. . . . Compromising cases of this magnitude, when they have reached the stage that this case has reached, creates a feeling of uneasiness in the public mind. American justice is so constituted that not only should it be fair and impartial but the litigants and the public should know that it is fair and impartial." *Id.* at 263.

In *Esco Corporation v. United States,* 340 F. 2d 1000, (9th Cir. 1965), Judge Barnes, who was once in charge of the Antitrust Division, wrote:

> "While a consent decree, forged by agreement between private and government attorneys, may not be a product of the trial judges own effort, it must be scrutinized carefully and approved, both as to form and content, by the court entering it, prior to such entry." *Id.* at 1005.

In *United States v. Radio Corporation of America*, 46 F. Supp. 654 (D. Del. 1942), appeal dismissed 318 U.S. 796, Circuit Judge Maris wrote:

> "A consent decree although based upon agreement of the parties rather than a finding of facts by the court, is not a mere authentication or recording of that agreement. It is a judicial act (*United States v. Swift & Co.*, 286 U.S. 106, 115, 52 S. Ct. 460, 760 L. ed. 999) and, therefore, involves the determination by the chancellor that it is equitable and in the public interest. The fact that the Court may consider the opinion of the Department of Justice to the same effect does not mean that the Court has abdicated its power, or failed to carry out its responsibility, to make an independent determination of the propriety and equity of the decree proposed by the parties. . . . It is fundamental to our form of government that in such suits, as in all other matters brought before them for judicial action, the Court must act 'in accordance with their own convictions, uninfluenced by the opinions of any and every other department of the government.' *Irvine v. Marshall*, 61 U.S. 558, 567, 20 How. 558, 15 L. ed. 994." *Id.* at 655.

In *United States v. Carter Products, Inc.*, 211 F. Supp. 144 (S.D.N.Y. 1962), when the Court was called upon to sign a consent decree between the government and one of two defendants charged with violating the antitrust laws, Judge Weinfeld made the following observation:

> "In passing upon the joint application of the Government and Carter for approval of their stipulation, the Court performs a judicial function and

> is called upon to decide whether it is equitable to enter the decree as proposed by them or with necessary modification to effectuate its basic purpose. While the public interest is a dominant consideration, the rights of third parties may not be ignored." *Id.* at 147-148.

These authorities establish the independent function which the District Court in this case was called upon to perform. The Court had to do justice between the parties to the action, as well as every man, woman and child who suffered during the sixteen year conspiracy. To accomplish such a formidable task within the structures of due process of law, the Court had to insure that it was presented with a record sufficient to inform it of all relevant facts upon which it could intelligently make the determination it was asked to make.

For example, the Court was not advised whether the proposed injunction would terminate conduct *then* being engaged in. In fact, the defendants'-appellees' brief in support of the settlement implied that the conduct complained of (after its sixteen year history) was no longer being engaged in. (Defendants' Opposition to Application for Leave to Intervene, Etc. p. 19). Further, the government at no time expressed its opinion of its potential for success on the merits. The government's brief in support of the settlement, however, contains the candid admission that "As a practical matter, access to the documentary evidence obtained by the Government in its investigation of this case may well prove to be nearly as helpful as an adjudication of violation." (Government's Response to Applications for Intervention, Etc., p. 22, lines 1-5). Did the Court, therefore, accept a consent decree consisting of a promise not to engage

in conduct previously engaged in for sixteen years, but not then being engaged in, in the face of government possession of documentary evidence sufficient to clearly establish liability on the part of the defendants?

The question before the Court was a judicial event of such magnitude, having such far-reaching consequences for American society, that the bare record before the Court was entirely inadequate and could not justify approval of the proposed consent decree.

The District Court Erred by Approving the Consent Decree in Its Proposed Form Without Inclusion of a Limited Admission of the Allegations in the Complaint as a Condition to Approval.

In objecting to entry of judgment on the consent decree as proposed, appellants, and others, requested the inclusion of a provision in the consent decree in which the defendants make a limited admission of the allegations in the government complaint. In rejecting this proposal the District Court seemed to be concerned more with settlement of the pending action than with protection of the public interest:

> "However, the defendants have made it clear that they would not consent to such a clause and if it were to be insisted upon, no settlement of the case would be possible. * * * [The value of such a clause] is doubtful, for insistence upon it would, for all practical purposes, eliminate the possibility of settling antitrust cases." [Memorandum Opinion, p. 4, lines 5-8, 29-32].

This overriding concern for the protection of the settlement mechanism does not give adequate consideration to Congressional antitrust enforcement policy for the protection of the public.

Congress envisaged both government and private actions to achieve the broad social object of the statute. *New Jersey Woodfinishing Co. v. Minnesota Mining and Manufacturing Co.*, 332 F. 2d 346 (3rd Cir. 1964) at 350-351, aff'd. 381 U.S. 311 (1965); *United States v. Cooper Corp.*, 312 U.S. 600 (1941) at 608-610; *Karseal Corp. v. Richfield Oil Corp.*, 221 F. 2d 358 (9th Cir. 1955) at 365; see also MacIntyre, The Role of the Private Litigant in Antitrust Enforcement, 7 Antitrust Bull. 113 (1962).

This Court has recognized the Congressional intent to ". . . use private self-interest as a means of enforcement of the antitrust laws". *Bruces Juices, Inc. v. American Can Co.*, 330 U.S. 743 (1947) at 751, and that private parties were to receive the benefits of prior government suits. *Minnesota Mining and Manufacturing Co. v. New Jersey Woodfinishing Co.*, 381 U.S. 311 (1965) at 317-318; *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951) at 566-568; *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 377 F. 2d 776 (3rd Cir. 1967) at 784-785, aff'd. in part, reversed in part, 392 U.S. 481 (1968); *Philadelphia Housing Authority v. American Radiator and Standard Sanitary Corp.*, 269 F. Supp. 540 (E.D. Penn. 1967) at 542; *Cinammon v. Abner A. Wolf, Inc.*, 215 F. Supp. 833 (E.D. Mich. 1963) at 834.

The historic intent of Congress to utilize private suits as a method of achieving effective antitrust compliance was well expressed by President Woodrow Wilson in 1914 when he urged Congress to facilitate the interaction of private and government actions by:

> ". . . giving private individuals who claim to have been injured by these processes the right to found

> their suits for redress upon the facts and judgments proved and entered in suits by the government where the government has upon its own initiative sued the combinations complained of and won its suit . . . . It is not fair that the private litigant should be obliged to set up and establish again the facts which the government has proved. He cannot afford, he has not the power, to make use of such processes of inquiry as the government has command of. Thus, shall individual justice be done while the processes of business are rectified and squared with the general conscience." Woodrow Wilson, "Special Address Delivered at a Joint Session of Congress" January 20, 1914, Messages and Papers of the Presidents, Volume XVI, Bureau of National Literature, Inc., p. 7918.

In 1955, Congressman Wright Patman echoed President Wilson's statement when he stated to the House Antitrust Subcommittee:

> "We have recognized that a necessary and integral part of any such policy is full and effective enforcement of our anti-monopoly laws. For many years it has been recognized that the government alone is not able to provide all the necessary enforcement. The help of all citizens is needed. We know that private parties will help in this endeavor if we afford them rightful opportunity." Statement of Representative Wright Patman before the Antitrust Subcommittee of the Committee on Judiciary, House of Representatives on H.R. 10243, August 6, 1958.

The Senate Committee Report on Proposed Amendments to Section 5 of the Clayton Act also emphasized

the need for the joint effort of the government and private litigants as an antitrust enforcement weapon:

> "The enactment of the Clayton Act in 1914 was in part a recognition by the Congress that Section 7 of the Sherman Act had not successfully stimulated private litigation for enforcement of the Sherman Act. . . .
>
> Since the enactment of the Clayton Act, the bulk of private antitrust litigation has followed successful government action, so that the judgments and decrees and the Federal proceedings could be used to establish a case. Amassing evidence for antitrust cases would otherwise be a prohibitively expensive task for most plaintiffs." (S. Rep. No. 619, 84th Congress, 1st Session, June 21, 1955; U.S. Code Cong. & Ad. News (1955) at 2329.

In *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951), this Court examined the history of the policy of assisting private litigants by prior government action:

> "Section 5 of the Clayton Act was adopted in response to a recommendation by President Wilson that Congress 'agree in giving private individuals . . . the right to found their (antitrust) suits for redress upon the facts and judgments proved and entered in suits by the Government where the Government has . . . sued the combinations complained of and won its suit.' . . .' 51 Cong. Rec. 1964. Congressional reports and debates on the proposal which ultimately became Section 5 reflect the purpose to minimize the burdens of litigation

> for injured private suitors by making available to them all matters previously established by the government in antitrust actions. . . ." *Id.* at 567-568.

In *Cinammon v. Abner A. Wolf, Inc.*, 215 F. Supp. 833 (E.D. Mich. 1963) the Court discussed the policy of the antitrust laws with respect to private treble damage actions:

> "The purpose of Section 4 of the Clayton Act, Title 15, U.S.C. Section 15, which provides for private triple damage suits is 'to enlist "the business public . . . as allies of the government in enforcing the antitrust laws;" the means chosen, on the other hand, is to give the "injured party ample recompence for the wrong suffered" by allowing three-fold recovery of damages.' Report of the Attorney General's National Committee to Study the Antitrust Laws, p. 378 (1955). In other words, the private antitrust suit is a substantial weapon in effectuating a national policy of protecting, preserving and promoting free competition in the market place by blending 'antitrust policy with private compensatory law.' " 215 F. Supp. at 834.

Three Assistant Attorneys General in charge of the Antitrust Division (two of them while in office) in articles and testimony before Congressional committees, have stated that private actions are a desirable and necessary supplement to government enforcement efforts. See Bicks, The Department of Justice and Private Treble Damage Actions, 4 Antitrust Bull. 5 (1959) at 8; Loevinger, Private Action—The Stongest Pillar of Antitrust, 3 Antitrust Bull. 167 (1958) at 168; Statement of Lee Loevinger, Hearings Before Subcommittee

of the Select Committee on Small Business, U.S. Senate 85th Congress, 2nd Session (1958), pp. 7, 16; Comment, Antitrust Enforcement by Private Parties: Analysis of the Developments in the Treble Damage Suit, 61 Yale L.J. 1010 (1952) at 1046, quoting testimony of H. Graham Morrison, Hearings on H.R. 3408, Subcommittee on Monopoly Power of the House Judiciary Committee, p. 12.

Richard W. McLaren, the present Assistant Attorney General in charge of the Antitrust Division, stated on December 11, 1969:

> "Private antitrust proceedings today are not merely a means of compensating victims of antitrust conspiracies; they provide a substantial and meaningful deterrent to violations of the antitrust laws. Indeed, until the Congress acts on our recommendation to increase the maximum Sherman Act fine for corporations from $50,000 to $500,000, the treble-damage action provides the only meaningful financial deterrent to antitrust violations." Remarks of Richard W. McLaren before the Antitrust Committees of the Federal Bar Association and the Philadelphia Bar Association, December 11, 1969.

The Federal Trade Commission has also stated that its policy in enforcement shall be directed toward assisting private litigants. *H. P. Hood & Sons, Inc.*, Docket No. 7709; 58 F.T.C. 1184 (1961) at 1189-1190.

The decree as approved by the District Court frustrates the Congressional policy of joint governmental-private effort in enforcement of the antitrust laws.

While Section 5(a) of the Clayton Act does give recognition to the consent decree procedure used by the United States in disposing of antitrust cases, this statutory recognition cannot be read as obliterating the overall Congressional policy for protection of free competition upon agreement of the parties to an action.

The public funds, manpower and facilities which were employed by the Department of Justice in its investigation of this sixteen year conspiracy, and which could be employed in the prosecution of this action, far exceed the resources available to any private plaintiff. The magnitude of the alleged violations demand that such resources be used to effectuate compliance with the antitrust laws. The delays necessarily created by the several-fold duplication of the government effort by the many parties affected by this action would be avoided by the prosecution of the United States' action.

The Department of Justice has previously recognized the need to cooperate with private litigants in pursuit of its obligation to further Congressional policy. The Department has accomplished this objective by including within certain consent decrees specific provisions (commonly known as an "asphalt clause") admitting the allegations of the complaint for the benefit of subsequent private litigants. The consent decrees in *United States v. Lake Asphalt and Petroleum Co. of Massachusetts*, 1960 C.C.H. Trade Cases, Para. 69,835 (D. Mass. 1960); and *United States v. Allied Chemical Corp.*, 1961 C.C.H. Trade Cases, Para. 69,923 (D. Mass. 1961) contained such provisions for the purpose of private actions by states and local governments which followed Federal government suits.

Defendants-appellees strenuously objected to the inclusion of an "asphalt clause" in the consent decree, and threatened to litigate the case fully if such a clause was included (Defendants' Opposition to Applications for Leave to Intervene and Other Petitions and Comments Regarding the Proposed Consent Decree, and Memorandum of Points and Authorities, p. 23).

That settlement may offer an expedient resolution of many or most antitrust cases does not mean that settlement in a particular case, *this case*, will produce the most satisfactory result. This case is unique in the extent of its impact upon the public interest. It can be fairly said that every individual in this country who breathes will be affected by the outcome of this action. The general importance of a dual governmental-private effort in combating antitrust violations as severe as those alleged in the government complaint make it clear that in this case the only viable alternative to a complete litigation of the issues is a consent decree containing a limited admission by the defendants of the allegations in the complaint. This admission would be solely for the purpose and to the extent necessary to give *prima facie* effect to the decree in subsequent private treble damage actions. The defendants-appellees readily recognize the onerous effects of the consent judgment obtained. Docket No. 31 of the Judicial Panel on Multidistrict Litigation of the United States District Courts is "In re: Multidistrict Private Civil Treble Damage Anti-trust Litigation Involving Motor Vehicle Air Pollution Control Equipment". In the January 1970 "Memorandum of Defendants in Response to Panel Order to Show Cause and Notice of Hearing", the defendants-

appellees make the following statement and observation:

> "If, after limited discovery, these motions [pre-trial motions] are not successful, it would appear that exhaustive full-scale discovery is likely to occur involving the examination of numerous witnesses and voluminous documents. This is especially so because, unlike some antitrust cases which have been the subject of consolidated pre-trial proceedings in the past, there has been no adjudication of liability here and, in addition, the right to assert a claim for damages is far from clear. In many of these other treble damages cases, the private plaintiffs have available to them a prior adjudication of antitrust violations which had *prima facie* effect, and, accordingly, the basic issue in those cases was not whether, but how much, the plaintiffs had been injured." (Pages 1 and 2).

The District Court Abused Its Discretion by Denying Consolidation of the Two Actions.

Rule 42(a) of the Federal Rules of Civil Procedure provides:

> "CONSOLIDATION. When actions involving a common question of law or fact are pending before the Court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs of delay."

Consolidation may be ordered before issues are joined where common questions are involved. *Schultz v. Man-*

ufacturers and Traders Trust Co., 29 F. Supp. 37 (W.D.N.Y. 1939). To expedite the trial and eliminate unnecessary repetition and confusion trial judges have been urged to make use of Rule 42(a). *DuPont v. Southern Pacific Company*, 366 F. 2d 193 (5th Cir. 1966).

Each of the two cases pending before the District Court involves like questions of law and fact and the same defendants.

> "The consolidation of an action brought *by* the United States with another action in which either the United States or a private person is plaintiff should be governed by the general principles of Rule 42, since the Federal rules are generally applicable to the United States and these actions do not involve any problem of sovereign immunity from suit." 5 Moore's Federal Practice, Para. 42.02, p. 42-19 (2nd Ed. 1968).

See also *Gerber Products Co. v. Beech-Nut Lifesavers, Inc.*, 25 F.R. Serv. 42a.1, Case 1 (consolidation of two antitrust cases against the common defendant, despite one unrelated issue in each case); *Atlanta Hydratane Gas, Inc. v. Lowery Tims Co.*, 41 F.R.D. 164 (N. D. Miss. 1966), (four actions by different plaintiffs consolidated where all plaintiffs sought relief against common defendant for alleged discrimination in pricing practices in violation of the Robinson-Patman Act). The delay, duplicity of expense, and time and inconvenience to witnesses created by maintaining these suits as separate actions could have been avoided by consolidating these essentially identical cases.

Conclusion.

The issues involved in this appeal are substantial. The resolution thereof will have a significant impact on the public interest. Plenary consideration by this Court is required. Historians may hopefully read William Shakespeare's observation as an anachronism:

> ". . . this most excellent canopy, the air, look you, this brave o'erhanging firmament, this majestical roof fretted with golden fire,—why, it appears no other thing to me than a foul and pestilent congregation of vapours."
>
> William Shakespeare, *Hamlet*,
> Act II, Scene II.

Respectfully submitted,

SCHWARTZ & ALSCHULER,
By BENJAMIN F. SCHWARTZ,
and
HERBERT A. KARZEN,
Counsel for Appellants,

APPENDIX A.

Judgment of the District Court.

[¶72,907] United States v. Automobile Mfrs. Assn., Inc., General Motors Corp., Ford Motor Co., Chrysler Corp., and American Motors Corp.

In the United States District Court for the Central District of California. Civil Action No. 69-75-JWC. Entered October 29, 1969.

Case No. 2037 in the Antitrust Division of the Department of Justice.

Sherman Act.

Conspiracy — Automobile Manufacturers — Development of Smog Control Devices—Joint Activities.—Four automobile manufacturers and their trade association were prohibited from conspiring to delay and obstruct the development and installation of pollution control devices for motor vehicles. The decree prohibitions include: (1) restraining in any way the individual decisions of each auto company as to the date when it will install emission control devices; (2) agreeing not to file individual statements with governmental agencies concerned with auto emission and safety standards and from filing joint statements on such standards unless the governmental agency involved expressly authorizes them to do so; (3) continuing a 1955 cross-licensing agreement and refusing to grant royalty-free licenses on auto emission control devices under patents subject to the 1955 agreement to all who may request them; (4) agreeing to exchange their companies' confidential information relating to emission control devices or to exchange patent rights covering future inventions in this area; and (5) continuing their joint assessment of pat-

ents on auto emission control devices offered to any of them by outside parties as well as their practice of requiring outside parties to license all of them on equal terms.

See Combination and Conspiracy, Vol. 1, ¶ 1680; Department of Justice Enforcement and Procedure, Vol. 2, ¶ 8834.10

For the plaintiff: Richard W. McLaren, Asst. Atty. Gen., Baddia J. Rashid, Lewis Bernstein, William D. Kilgore, Jr., Raymond W. Philipps, Bernard M. Hollander, Allen E. McAllester, Charles F. B. McAleer, and C. Brooke Arnold, Attys., Dept. of Justice.

For the defendants: Gibson, Dunn & Crutcher, Julian O. Von Kalinowski, Paul G. Bower, Wilmer, Cutler & Pickering, Lloyd N. Cutler, and Howard P. Willens, for Automobile Mfrs. Assn., Inc.; Ross L. Malone, Lawler, Felix & Hall, Magens Mattson, and Robert Hemgson, for General Motors Corp.; Overton, Lyman & Prince, Earl J. Schuck, Wayne H. Knight, for Ford Motor Co.; McCutchen, Black, Verleger & Shea, Philip K. Verleger, and William G. Shea, for Chrysler Corp.; O'Melveny & Myers, Allyn D. Kreps, and Girard E. Boudreau, Jr., for American Motors Corp.

Final Judgment

CURTIS, D. J.: The plaintiff, United States of America, having filed its complaint herein on January 10, 1969, and the plaintiff and the defendants, by their respective attorneys having severally consented to the entry of this Final Judgment without trial or adjudication of or finding on any issues of fact or law herein and without this Final Judgment constituting evidence or an admission by any of them in respect to any such

Now, Therefore, before any testimony has been taken and without trial or adjudication of or finding on any issue of fact or law herein, and upon consent of the parties as aforesaid, it is hereby

Ordered, Adjudged and Decreed as follows:

I

[*Jurisdiction*]

This Court has jurisdiction of the subject matter herein and of the parties hereto. The complaint states a claim upon which relief may be granted against the defendants under Section 4 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Antitrust Act, as amended.

II

[*Definitions*]

As used in this Final Judgment:

(A) "Devices" means air pollution emission control designs, devices, equipment, methods, or parts thereof, for motor vehicles.

(B) "Restricted information" means all unpublished information of the type customarily classified as company confidential concerning applied as distinguished from basic research in or concerning the development, innovation, manufacture, use, sale or installation of Devices. It includes trade secrets, unpublished company policy, and other unpublished technical information for developing, making, improving or lowering the cost of Devices by motor vehicle manufacturers. "Restricted information" shall not mean (1) information concerning basic research in gaining a fuller knowledge or understanding of the fundamentals of phenomena and of observable facts, or (2) information which is or becomes known to the public generally other than through a violation of this Final Judgment.

understanding of the presence, nature, amount, causes, sources, effects or theories of control of motor vehicle emissions in the atmosphere, or (ii) information relating primarily to equipment, methods or procedures for the testing or measurement of Devices, or (iii) information for or resulting from the testing or measurement of production prototypes of Devices of an advanced stage exchanged solely for such purposes. Information shall be deemed to be published when it is disclosed without restriction to the public, or to media of general circulation, or to the trade press, or to meetings of stockholders, dealers, or financial analysts, or to meetings of professional, scientific or engineering societies, or committees thereof, the membership of which is not limited to persons employed by defendants or by motor vehicle manufacturers, or to meetings called by representatives of Federal, state or local governments or agencies authorized to issue motor vehicle emission control regulations.

III

[*Applicability*]

The provisions of this Final Judgment shall be binding upon each defendant and upon each of its subsidiaries, officers, directors, agents, servants, employees, successors and assigns, and upon all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise, but shall not apply to any transaction between or among a parent company, its subsidiaries, officers, directors, agents, servants and or employees. Nothing in this Final Judgment shall have any effect with respect to any activities out-

side the United States which do not adversely and substantially affect the foreign commerce of the United States.

IV

[*Pollution Control Devices*]

(A) Each defendant is enjoined and restrained from:

(1) Combining or conspiring to prevent, restrain or limit the development, manufacture, installation, distribution or sale of Devices;

(2) Entering into, adhering to, enforcing or claiming any rights under any provisions of any agreement, arrangement, understanding, plan or program (hereinafter "agreement") with any other defendant or manufacturer of motor vehicles or Devices:

(a) to exchange restricted information;

(b) to cross-license patents or patents rights on Devices which cross-license includes patents or patent rights acquired subsequent to the date of any such cross-license;

(c) to delay installation of Devices or otherwise restrain individual decisions as to installation dates;

(d) to restrict publicity of research and development relating to Devices;

(e) to employ joint assessment of the value of patents or patent rights of any third party relating to Devices;

(f) to require that acquisition of patent rights relating to Devices be conditioned upon availability of such rights to others upon a most-favored-purchaser basis;

(g) to file, in the absence of a written authorization for a joint statement by the agency involved, with any governmental regulatory agency in the United States authorized to issue emission standards or regulations for new motor vehicles or Federal motor vehicle safety standards or regulations, any joint statement regarding such standards or regulations except joint statements relating to (i) the authority of the agency involved, (ii) the draftsmanship of or the scientific need for standards or regulations, (iii) test procedures or test data relevant to standards or regulations, or (iv) the general engineering requirements of standards or regulations based upon publicly available information; provided that no joint statement shall be filed which discusses the ability of one or more defendants to comply with a particular standard or regulation or to do so by a particular time, in the absence of a written agency authorization for such a joint statement, and provided also that any defendant joining in a joint statement shall also file a statement individually upon written request by the agency involved; or

(h) not to file individual statements with any governmental regulatory agency in the United States authorized to issue emission standards or regulations for new motor vehicles or Federal motor vehicle safety standards or regulations.

(B) Nothing in this Final Judgment shall prohibit any defendant

(1) from furnishing or acquiring any restricted information for the defense or prosecution of any litigation or claim;

(2) from entering into or performing under any otherwise lawful agreement with any other person or

conducting *bona fide* negotiations looking to any such agreement:

(a) for the purchase or sale of specific commercial products;

(b) for the license of specific existing patent rights or from including in any such agreement provision for a nonexclusive grant back of patent rights on improvements obtained by the licensee during the term of the license or a reasonable period thereafter; or

(c) for the purchase, sale or license of specific existing restricted information or specific engineering services relating to Devices or from including in any such agreement provision for a nonexclusive grant-back of patent rights on improvements obtained by the license during the term of the license or a reasonable period thereafter; or from furnishing or acquiring any restricted information directly relating thereto;

(3) from entering into, renewing or performing under any otherwise lawful agreement with any non-defendant person, firm or corporation that does not account for more than 2% of world production of motor vehicle passenger car, truck and bus units in the calendar year preceding the entering into or renewing such agreement (See Appendix A [Not Reproduced]); or

(4) from entering into, renewing or performing under any agreement which is submitted in writing to the plaintiff and to which plaintiff consents in writing.

(C) Nothing in Section IV(A)(2)(a) shall prohibit any defendant from engaging in any activity outside the United States reasonably necessary:

(1) to the development of, response to, or compliance with existing or proposed vehicle emission laws, regulations or standards of a foreign governmental body, or

(2) to the performance under any otherwise lawful agreement for the production of motor vehicles outside the United States with any person, firm or corporation not engaged in the production of motor vehicles in the United States at the time of entering into or renewing such agreement.

V

[Withdrawal from Cross-Licensing Agreement]

(A) Each manufacturing defendant is ordered and directed to exercise its right to withdraw from the AMA cross-licensing agreement of July 1, 1955, as amended, and to take such steps as are necessary to accomplish said withdrawal within one hundred twenty (120) days from the date of entry of this Final Judgment. Notwithstanding such withdrawal defendants may continue to exercise those rights and claims relating to royalty-free licenses under the cross-licensing agreement which have accrued up to the date of entry of this Final Judgment.

(B) Defendant AMA is ordered and directed to relinquish its responsibilities under the AMA cross-licensing agreement of July 1, 1955, as amended, within sixty (60) days from the date of entry of this Final Judgment.

VI.

[Co-operation with Licensees]

(A) Upon written request therefor and subject to the conditions set forth herein:

(1) Each manufacturing defendant is ordered and directed to grant to any person to the extent that it has the power to do so a nonexclusive, non-transferable and royalty-free license to make, have made, use, lease or sell Devices under any claim of any United States patent or any United States patent application owned or controlled by said defendant or under which it has sublicensing rights, which patent was issued or application was filed prior to the date of entry of this Final Judgment and licensed under the AMA cross-licensing agreement of July 1, 1955, as amended, provided that if the manufacturing defendant is obligated to pay royalties to another on the sales of the licensee the license under this paragraph may provide for the payment of those same royalties to the defendant;

(2) Each manufacturing defendant shall grant to any licensee under (1) above, to the extent that it has the power to do so, an immunity from suit under any foreign counterpart patent or patent application for any product manufactured in the United States under the license for sale abroad or for any product manufactured abroad and sold in the United States, provided that if the manufacturing defendant is obligated to pay royalties to another on the sales of the licensee the license

may provide for the payment of those same royalties to the defendant; and

(3) Defendant AMA is ordered and directed to make available for examination and copying by any person the technical reports in its possession or control prepared or exchanged by defendants pursuant to said cross-license within two years prior to the entry of this Final Judgment, which are identified in Appendix B [not reproduced];

(B) Any existing licensee of any manufacturing defendant shall have the right to apply for and receive a license or licenses under this Final Judgment in substitution for its existing license or licenses from any manufacturing defendant, insofar as future obligations, and licenses are concerned. Any licensee shall be free to contest the validity and scope of any licensed patent.

VII

[*Notification*]

Defendant AMA is ordered and directed to mail a copy of this Final Judgment to all signatories to the AMA cross-licensing agreement of July 1, 1955, as amended, and to all known domestic manufacturers of motor vehicles and motor vehicle engines within thirty (30) days from the date of entry of this Final Judgment, and to issue a press release to the domestic trade and business press relating the substance of the Final Judgment.

VIII

[Inspection and Compliance]

For the purpose of determining or securing compliance with this Final Judgment, duly-authorized representatives of the Department of Justice shall, upon written request of the Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principle office, be permitted, subject to any legally recognized privilege, access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant relating to any matters contained in this Final Judgment, and subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendant, who may have counsel present, regarding any such matters. Said defendant, upon the written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be requested. No information obtained by the means provided in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

IX

[Expiration]

Section IV(A)(2)(a) and (g) of this Final Judgment shall expire ten years after the date of entry hereof, provided that plaintiff may apply to this Court for the continuation of one or both of said provisions, such application to be made not later than nine years after the date of entry of this Final Judgment.

X

[Jurisdiction Retained]

Jurisdiction if this cause is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for sich further orders and directions as may be necessary or appropriate in relating to the construction of or carrying-out of this Final Judgment, for the modification or vacating of any of the provisions thereof, and for the purpose of the enforcement of compliance therewith and the punishment of violations thereof.

APPENDIX B.

Memorandum Opinion.

United States District Court, Central District of California.

United States of America, Plaintiff, vs. Automobile Manufacturers Association, Inc.; General Motors Corporation; Ford Motor Company; Chrysler Corporation; and American Motors Corporation, Defendants. 69-75-JWC.

This is an action brought by the United States of America charging that the defendants, Automobile Manufacturers Association, Inc.; General Motors Corporation; Ford Motor Company; Chrysler Corporation; and American Motors Corporation have conspired with other motor vehicle manufacturers, in violation of § 1 of the Sherman Act (15 U.S.C. § 1), to eliminate competition in the research, development, manufacture and installation of motor vehicle air pollution control equipment, and in the purchase from others of patents and patent rights, covering such equipment. By way of relief, the plaintiff is seeking an order enjoining these defendants from continuing the alleged unlawful conduct.

After eight months of negotiation, the parties have agreed to settle this case upon terms and conditions embodied in the proposed consent decree now before this court for approval.

On September 11, 1969, the proposed decree was made public and all interested parties, including the State of California, County of Los Angeles, City of Los Angeles and the Air Pollution Control District of the County of Los Angeles, were invited to express